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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

WILLIAM CAHN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner William Cahn prays that a writ of certiorari issue to review the judgment and opinion entered November 2, 1970, by the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the Fifth Circuit is reported at 433 F.2d 1282 and is reprinted in the Appendix hereto, p. 1a, *infra.*

JURISDICTION

By its judgment of November 2, 1970, the Fifth Circuit affirmed the judgment of conviction entered by the United States District Court for the Southern District of Florida on a jury verdict finding petitioner guilty of violations of 18 U.S.C. § 77q(a) and 18 U.S.C. § 1341 and of conspiracy in violation of 18 U.S.C. § 371. A timely petition for rehearing was denied by the Fifth Circuit on January 6, 1971. On a timely application, Mr. Justice Douglas on February 2, 1971, ordered that the time for filing this petition be extended to and including March 4, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED [1]

Whether, in light of the Court's recent decisions linking standing to suppress to considerations other than those of property, the proprietary rights conferred by the Bankruptcy Act upon a trustee in bankruptcy of a corporation deprive the corporation's president and sole stockholder of standing he would otherwise have to object to use against him, in a criminal prosecution unrelated to the bankruptcy, of evidence obtained by a government agent through a warrantless search of the corporate records conducted without the knowledge or consent of the president and sole stockholder, but with the consent of the trustee.

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[1] Petitioner adopts herein the Question Presented in the petition of Fred H. Adler, No. 1191, and Question No. 2 of the Questions Presented in the petition of Mark H. Kroll, No. 1314, both earlier filed herein. The rulings of the trial court relating to the said questions were made applicable by the said court to this petitioner as well. App. 282.

CONSTITUTION, STATUTES AND RULE

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 11, United States Code:

§ 75. *Trustees; duties*

(a) Trustees shall . . . (10) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; . . .

§ 110. *Title to property*

(a) The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located (1) documents relating to his property; . . .

Title 15, United States Code:

§ 77s. *Special powers of Commission*

* * *

(b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this subchapter, any member of the Commission or any officer or

officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. * * *

§ 77v. *Jurisdiction of offenses and suits*

* * *

(b) In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

§ 78u. *Investigations; injunctions and prosecutions of offenses*

* * *

(b) For the purpose of any such investigation, . . . any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. * * *

(c) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United

States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission, . . . there to produce records, if so ordered, . . . ; and any failure to obey such order of the court may be punished by such court as a contempt thereof. * * *

Title 18, United States Code:

§ 3057. *Bankruptcy investigations*

(a) Any referee, receiver, or trustee having reasonable grounds for believing that any violations of the bankruptcy laws or other laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, or that an investigation should be had in connection therewith, shall report to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed. * * *

Federal Rules of Criminal Procedure:

Rule 41. *Search and Seizure*

* * *

(e) A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained. * * *

STATEMENT OF THE CASE

Petitioner and six others were convicted of multiple counts, involving use of the mails in a scheme to defraud, largely on the basis of a mass of corporate books and papers introduced in evidence against them or used as the source for summary charts which were introduced in evidence. A substantial part of the evidence came from the records of a corporation of which petitioner was the organizer, president, sole stockholder and "guiding light". Appendix hereto, p. 9a, *infra;* App. 639.

About December 1961, petitioner's corporation had been forced into bankruptcy and its property, including its books and records, came into the custody of a receiver and then a trustee. The records remained at first in the original office of the corporation. After some time, since high rental office space was no longer necessary, the referee in bankruptcy authorized removal of the effects of the corporation first to a smaller space in another building, later to an office in the building occupied by the trustee and eventually to a room adjoining the trustee's own office. App. 348-52, 621-22; Appendix hereto, p. 9a, *infra.*

In November 1965, an agent of the Securities and Exchange Commission requested the trustee's permission to examine the corporate records. The agent had no warrant and, although he claimed to have a "formal order of investigation", did not claim to have a subpoena.[2] The trustee granted permission and the agent

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[2] The Securities Act of 1933, 15 U.S.C. § 77s(b), provides:

> "For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this subchapter, any member of the Commission or

proceeded to browse through the records at will. When the agent requested permission to remove records from the premises, the trustee obtained an *ex parte* order from the bankruptcy court granting such authority. The evidence gathered by the agent was presented to the grand jury and at trial. Petitioner was never asked to consent to the agent's examination of the records and, indeed, had no notice that the trustee had allowed the examination and removal. App. 621-25, 635, 642; Appendix hereto, p. 9a, *infra.*

At the beginning of the trial, petitioner moved to suppress the evidence obtained through the SEC agent's examination of the corporate records. The court denied the motion. App. 140-41, 648-G.

The Fifth Circuit, while considering the issue presented by the denial of the motion to suppress to be "one of the more difficult issues of the case" and "concededly . . . close", held that petitioner had no standing to complain about the search. Having so concluded, the court purported not to reach the question whether the trustee had authority to consent to the search. But a component of its holding on standing was that, in

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any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry."

A similar provision is contained in the Securities Exchange Act of 1934. 15 U.S.C. § 78u(b). The Commission's order designating the officer to conduct the investigation is the "formal order of investigation" possessed by the agent in this case.

Under both statutes, the manner in which the designated officer may require production of documents is the traditional one: issuance of a subpena duces tecum and application to a district court for an enforcement order in the event of noncompliance. 15 U.S.C. §§ 77v(b) and 78u(c).

view of the trustee's broad powers of disposition over the corporate records, petitioner could have had no reasonable expectation of freedom from governmental intrusion into them. In all other respects as well, the court's conclusion that petitioner lacked standing was founded upon consequences of the bankruptcy. By operation of the bankruptcy law, said the court, petitioner lost all proprietary or possessory interest in the records and, because the trustee had moved the records before the search, petitioner had no interest in the searched premises. Appendix hereto, pp. 9a-13a, *infra.*

REASONS FOR GRANTING THE WRIT

But for the bankruptcy circumstances, the court below seemed to grant that under this Court's liberalization and redefinition of standing requirements in *Jones* v. *United States,* 362 U.S. 257 (1960), *Katz* v. *United States,* 389 U.S. 347 (1967), and *Mancusi* v. *DeForte,* 392 U.S. 364 (1968), petitioner, as organizer, president, sole stockholder and "guiding light" of the corporation, would have had standing to protest a search of the corporate records by a government agent without a warrant. Indeed, that was the purport of the Fifth Circuit's earlier holding in *Henzel* v. *United States,* 296 F.2d 650 (5th Cir. 1961).

Henzel, like Cahn here, was the organizer, president and sole stockholder of his corporation. In holding he had standing, the court said:

> "Since a corporation has the same rights as a natural person to be free from illegal searches and seizures, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S. Ct. 182, 64 L.Ed. 319, there is nothing in the corporate status of Chemoil which would prevent appellant from attacking the un-

> lawful search and seizure of the corporation's property." 296 F.2d at 652.

The court then went on to conclude that Henzel was a "person aggrieved" under Rule 41(e), F.R.Crim.P. 296 F.2d at 652-53. There seems little room for doubt[3] that in this search and seizure of the books and records of a one-man corporation, no less than that in *Henzel,* the man was "a victim of a search and seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search and seizure directed at someone else." *Jones* v. *United States,* 362 U.S. at 261.

Nor was petitioner here any the less the victim of the search and seizure merely because the SEC agent, rather than making it in the original office of the bankrupt corporation, waited until the trustee, to save rent, had moved the office three times. Suppose, for example, that petitioner himself, before the bankruptcy, had caused the corporation to move to a new office and, on the first day before petitioner made his first appearance at the new office, a government agent broke in and seized the records. Surely, in such a case, today's law would allow him standing to complain even though he could not show he had ever been in the searched premises. The fact that the trustee moved the corporation to new offices changes nothing, for, by operation of bankruptcy law, Cahn would have neither proprietary rights nor right of access to either the old or the new

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[3] Defense efforts to put the matter beyond any possible doubt were frustrated by the trial court's ruling sustaining a prosecution objection to a question put to the SEC agent about the purpose of his examination of the records. App. 626-27.

office. Yet, being barred from the original office would not deprive him of standing had the search been made there. *United States* v. *Kanan,* 225 F. Supp. 711, 713 (D. Ariz. 1963), *app. dismissed,* 341 F.2d 509 (9th Cir. 1965). Standing no longer turns upon particular space-time permutations. In *Spinelli* v. *United States,* 393 U.S. 410, 412 n. (1969), for example, this Court simply brushed aside the circumstance that the accused was not in the searched premises at the time of the search, saying:

> "Since petitioner would plainly have standing if he had been arrested inside the apartment, *Jones* v. *United States,* 362 U.S. 257, 267 (1960), it cannot matter that the agents preferred to delay the arrest until petitioner stepped into the hallway—espeically when the FBI only managed to gain entry into the apartment by requiring petitioner to surrender his key."

In denying standing here, the court distinguished this case from *Henzel* on the ground that the trustee's proprietary rights over the records and his removal of them from the original corporate premises cut off the standing that petitioner would otherwise have had. One is thus quickly brought to a consideration of how, if at all, the fact of bankruptcy and its built-in legal consequences should be permitted to affect the accused's otherwise available standing to protect his constitutional right to be free of unlawful search and seizure.

The starting point of the holding below is that the Bankruptcy Act transfers to the trustee the property of the bankrupt, including books and records. 11 U.S.C. § 110(a). The attributed effect of that transfer of proprietary rights to deprive a bankrupt of consti-

tutionally derived rights he might otherwise have had stems from this Court's decisions in *Johnson* v. *United States,* 228 U.S. 457 (1913), *Re Fuller,* 262 U.S. 91 (1923), and *Dier* v. *Banton,* 262 U.S. 147 (1923).

In *Johnson,* decided before the promulgation of the Court's rule excluding evidence obtained in violation of the Fourth Amendment,[4] only a Fifth Amendment question was presented. The Court held that, since a trustee in bankruptcy, by operation of law, owns the books and records, the bankrupt has no privilege that they not be used in prosecuting him for a crime.[5]

In *Fuller* and *Dier,* the Court, following its holding in *Johnson,* held that the bankrupt may neither withhold his books and records from a trustee who has already been served with a grand jury subpoena for their production in a prosecution of the bankrupt, nor enjoin a receiver from complying with such a subpoena. Both decisions rested on the passage of "possession" and "control" of the books and records from the bankrupt to the officer in question. *Re Fuller,* 262 U.S. at 93; *Dier* v. *Banton,* 262 U.S. at 149-50.

Both *Fuller* and *Dier* were decided after *Weeks* v. *United States,* 232 U.S. 383 (1914), but long before the judicial recognition that "it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined

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[4] *Weeks* v. *United States,* 232 U.S. 383 (1914).

[5] The *Johnson* case should, perhaps, be treated as having only limited application, for the prosecution there involved was for a violation of the Bankruptcy Act, a matter as to which the Act itself now specifically imposes on the trustee a duty to turn over information in aid of prosecution. 18 U.S.C. § 3057.

by the common law in evolving the body of private property law. . . ." *Jones* v. *United States,* 362 U.S. 257, 266 (1960). Under the "standing" rules which prevailed when *Fuller* and *Dier* were decided, the transfer of proprietary rights and powers to the bankruptcy officer left the bankrupt denuded of standing to invoke the exclusionary rule.

Now the Court has stripped away from the standing question the years-old encrustation of property law and has begun to focus on new factors: the individual as "a victim of a search or seizure, one against whom the search was directed," *Jones,* 362 U.S. at 261; the Fourth Amendment's protection of "people—and not simply 'areas'—against unreasonable searches and seizures," *Katz* v. *United States,* 389 U.S. 347, 353 (1967); the protection of individuals against violation of their privacy in circumstances in which they justifiably rely on privacy, *ibid.;* and the fact that a place or the things in it, although not altogether private, can reasonably be expected to be unavailable to a policeman's search. *Mancusi* v. *DeForte,* 392 U.S. 364, 369 (1968). Under this new focus, it no longer follows automatically that the Bankruptcy Act's transfer of "property" to the trustee deprives the bankrupt of the right to protest a policeman's general search of it, without warrant, for evidence to use against him in a criminal prosecution. The *Johnson-Fuller-Dier* line of authority no longer applies, unless, on re-examination, there be found in the requirements of bankruptcy law some feature of the trustee's proprietary interest which functionally precludes the bankrupt's standing.

The purpose of the law's transfer from the bankrupt to a court-appointed officer of the possession and con-

trol of the bankrupt's property is to assure proper distribution of the estate. *Dier* v. *Banton,* 262 U.S. at 150. The property interest which, by operation of law, devolves upon the trustee under the Bankruptcy Act, 11 U.S.C. § 110(a), need only be, therefore, such interest as he requires to effectuate that purpose. If the trustee takes a right or interest of the bankrupt which is in no way useful toward protection of creditors, the bankrupt can justly complain, in Iago's words, that he

> "Robs me of that which not enriches him,
> And makes me poor indeed."

That the trustee acquires the bankrupt's "property" does not necessarily mean that nothing is left to the bankrupt. As was explained in *Fisher* v. *Cushman,* 103 Fed. 860, 864 (1st Cir. 1900), in limiting the property the trustee acquires to such things as can produce capital for distribution to creditors:

> "All that can be said positively in reference to [the word 'property'] is that, when found in a statute like the bankrupt act, it is not to be construed in any loose, popular sense, but with regard to the limitations which the law attaches to it."

So, also, the trustee does not acquire rights to future earnings, for the bankrupt must be left with those "rights and privileges which go to make up a man's liberty and freedom." *In re Home Discount Co.,* 147 Fed. 538, 548 (N.D. Ala. 1906).

It is, of course, conceded that the trustee does acquire the bankrupt's books and records. He takes that property, however, in the words of *Fisher* v. *Cushman, supra,* under "the limitations which the law attaches

to it." In *In re Transatlantic & Pacific Corp.*, 216 F. Supp. 546 (S.D.N.Y. 1963), where a trustee was asserting, at p. 550, that he had a power of disposition over the books and records of a bankrupt corporation as unlimited as over any of the other bankrupt property passing to him by operation of law, the court said, at p. 552:

> "Whatever may have been the rights of the Bankrupt as to its own books and records before the date of bankruptcy, the Trustee in bankruptcy does not enjoy the same autonomy. The Trustee's activities are specifically circumscribed by the Bankruptcy Act. His actions must be compatible with the bankrupt's best interests as well as the interests of the bankrupt's creditors. 2 Collier, Bankruptcy 1737 (Moore ed. 1962). The contention that the Trustee possesses the same unlimited powers over the bankrupt's books as did the bankrupt before the bankruptcy is wholly without merit."

The issue in *Transatlantic & Pacific* was whether the trustee had authority to sell to an outsider access to the bankrupt's books and records. The court refused to reach the trustee's contention that the proposed sale would be beneficial to the estate, because it held that "disclosure of the books and records of the Bankrupt to a non-party in interest is not sanctioned by the provisions of the Bankruptcy Act. . . ." 216 F. Supp. at 554. The Act provides that "trustees shall . . . furnish such information . . . as may be requested by parties in interest. . . ." 11 U.S.C. § 75(a)(10). The statute does not define "parties in interest", but judicial definitions have limited it to creditors, the bankrupt, and, generally, persons whose pecuniary interests are di-

rectly affected by the bankruptcy proceedings. 216 F. Supp. at 552. In *Transatlantic & Pacific,* the trustee conceded and the court found that the would-be purchaser of the records, for use in evidence in a lawsuit unrelated to the bankruptcy, was not a "party in interest".

If the trustee's "property" in the books and records is insufficient to permit him to sell access to them for use in an unrelated civil litigation, may he gratuitously give such access for use in an unrelated criminal prosecution? It is no answer to say that it is consistent with his duty as a citizen to cooperate with the prosecutor, for the question is whether the "property" given him by the Act is broad enough to permit him to do so. The Act specifically gives him that power in the case of a bankruptcy-related prosecution. 18 U.S.C. § 3057. Since the Act limits that grant of power to bankruptcy-related prosecutions and since, for purposes generally, it authorizes access only to "parties in interest", we submit that the trustee lacked the power he exercised here to consent to a search of the bankrupt's records for the purpose of a prosecution unrelated to the bankruptcy. Before the bankruptcy, the bankrupt himself, of course, could have consented to a search, but, as said in *Transatlantic & Pacific,* the trustee's powers as to the books and records, as circumscribed by the Bankruptcy Act, are more limited than those of the bankrupt.

Each successive Congress, in recent years, has added new white-collar crimes, the prosecution of which is greatly expedited by easy access to business records. The district courts have been acquiring control of the business records of new bankrupts at the rate of about

200,000 a year.[6] If the function of the exclusionary rule is to deter illegal searches and if standing require-
Alderman v. *United States,* 394 U.S. 165, 175 (1969);
ments are designed to comport with that purpose, White and Greenspan, *Standing to Object to Search and Seizure,* 118 U. Pa. L. Rev. 333 (1970), it becomes important for this Court to reconsider judgments made in earlier times and under different conditions. To the extent that government investigators and prosecutors will increasingly be tempted into general warrantless searches of the files of bankrupts, it becomes increasingly important for the Court, in reconsideration of the conflict between the constitutional rights of the bankrupt and the prosecutorial interest of the government, to light the way toward some procedure tending to accommodate both. Such a procedure, we suggest, would have been for the trustee here, when approached by the SEC agent, to have notified petitioner on behalf of the bankrupt corporation of the agent's desire to search the records. Petitioner would then have had the opportunity of asserting or waiving his constitutionally derived right against an unwarranted general search of the records for evidence on which to prosecute him. Compare, in this regard, the earliest of this Court's decisions in this area, *In re Harris,* 221 U.S. 274 (1911), in which the Court called it "a proper exercise of the authority of the bankruptcy court" to order the bankrupt to deposit his books and records

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[6] In the two decades from fiscal year ending June 30, 1948, to fiscal year ending June 30, 1967, the number of bankruptcy cases filed each year in the United States district courts increased from 18,510 to 208,329. *Tables of Bankruptcy Statistics,* Year Ending June 30, 1967, Administrative Office of the United States Courts (prepared in accordance with Sec. 53 of the Bankruptcy Act, 11 U.S.C. § 81), Comments, p. 2.

with the receiver, to be used only for bankruptcy purposes and not for any criminal proceeding, with a provision that the receiver, if subpoenaed for them, should notify the bankrupt so that the latter "might have an opportunity to raise the question of his constitutional privilege."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfuly submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24583

MARK H. KROLL, WILLIAM CAHN, WILLIAM CRISWELL, JACK CHERNAU, JOHN S. HUNT, ROBERT C. BROWN and FRED H. ADLER, *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeals from the United States District Court for the Southern District of Florida

(November 2, 1970)

Before PHILLIPS*, BELL and SIMPSON, Circuit Judges

SIMPSON, Circuit Judge: The appellants, Mark H. Kroll, William Cahn, William Criswell, Jack Chernau, John S. Hunt, Robert C. Brown and Fred H. Adler, are here seeking relief from judgments of conviction entered after jury verdict of guilty[1] in the district court. They raise a

* Honorable Orie L. Phillips of the Tenth Circuit, sitting by designation.

[1] Each of the seven appellants was convicted under seven counts of willful violation of Title 15, U.S.C. § 77q(a) (use of the mails in furtherance of a scheme to defraud in the sale of securities), four counts of willful violation of Title 18, U.S.C. § 1341 (use of the mails in furtherance of a scheme to defraud), and one count of violation of Title 18, U.S.C. § 371 (conspiracy).

myriad[2] of grounds upon which they claim that the convictions are defective. We affirm.

The indictment charged and the jury found that the defendants had engaged in a scheme to defraud investors in the offer and sale, through American Bonded Mortgage Company, Inc. (ABM), and affiliated companies, of notes secured by mortgages, promissory notes, evidences of indebtedness, investment contracts and mortgage insurance bonds during the period from about January 20, 1958 to about December 31, 1961.

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[2] At least twenty-five grounds of error are asserted by one or more appellants. This opinion will take up and dispose of what we consider to be the eleven most serious grounds. The other fourteen which we record below simply to indicate that they have not been overlooked, are found completely without merit and not warranting discussion here. Some border on the frivolous. These grounds are:

(1) Inflammatory prosecutorial remarks.

(2) Admission into evidence of pre-September 1959 Expenditures.

(3) Admission of testimony of investors not named in the indictment.

(4) Improper cross-examination of defendant Adler.

(5) Prejudicial response of government's investor witness.

(6) Improper hypothetical question posed by trial judge.

(7) Introduction of Exhibit 508.

(8) Length of trial prejudicial.

(9) Introduction of hearsay evidence.

(10) Variance between proof and indictment.

(11) Improper instruction with regard to the use of the mails.

(12) Denial of appellants' requested instruction in answer to jury's request for additional instruction.

(13) Refusal to give appellant Kroll's requested stock ownership instruction.

(14) Refusal to give appellants' requested instruction on reliance upon advice of counsel.

The facts of this case are multi-faceted and extremely complicated. Because of the nature of the challenges raised here and discussed *infra* it is not necessary that we recount in detail the lengthy and involved scheme alleged. Succinctly stated, it was alleged that the defendants engaged in an intensive campaign whereby risky and virtually worthless mortgages were purchased from sources affiliated with ABM, a company established to deal in mortgages, were represented to be fully insured as to interest and principal by what in fact was a financially unsound ABM-affiliated insurance company, and were sold to the public by means of false and misleading advertisements and other false statements made to investors. In December, 1961, ABM was petitioned into bankruptcy along with its affiliated companies after allegedly defrauding investors of millions of dollars.

We proceed to discuss in some detail the points raised which we consider worthy of discussion.

I.

Sufficiency of Evidence To Sustain Conviction

Each of the defendants except Cahn asserts that there was insufficient evidence in the record to support his conviction, and that it was error for the court to deny the respective motions for judgments of acquittal. On a motion for judgment of acquittal the test is whether, in the view most favorable to the government, a reasonably-minded jury might accept the relevant evidence as adequate to support a conclusion of the defendants' guilt beyond a reasonable doubt. *Glasser* v. *United States,* (1942) 315 U.S. 60, 60, 62 S.Ct. 457, 86 L.Ed. 680; *Mortensen* v. *United States,* (1944) 322 U.S. 369, 64 S.Ct. 1037, 88 L.Ed. 1331; *Davis* v. *United States,* 5 Cir. 1967, 385 F.2d 919; *Lambert* v. *United States,* 5 Cir. 1958, 261 F.2d 799; *Vick* v. *United States,* 5 Cir. 1954, 216 F.2d 228, 232. These jury verdicts, then, must be

permitted to stand if there is substantial evidence to support them, taking the view most favorable to the government, without weighing conflicting evidence or testing the credibility of the witnesses, and allowing in favor of the verdicts all reasonable inferences from the evidence.

The government introduced evidence tending to prove that the defendants developed a highly-organized sales campaign replete with half-truths, misrepresentations, and other deceptive techniques in order to interest investors in purchasing mortgages. The salesmen were furnished with complete sales kits extolling the financial soundness of the program offered. The sickly financial condition of ABM was not disclosed to investors. Salesmen were instructed to tell prospective investors that the mortgages were on "preferred, selected, single-family Florida homes", when in truth many of the mortgages encumbered much less desirable properties. It was represented that the mortgages were insured by a policy which was authorized by the Florida Insurance Commissioner, when the Commissioner had not so approved the policy. Investors were told that investments in mortgages were 100% safe because the mortgages were insured, when in fact the ABM-affiliated insurance company was inadequately financed to insure fully the risks presented. Relevant matters withheld from investors included: ABM's lack of mortgages in inventory, the poor quality and near worthlessness of mortgages assigned, the fact that mortgages were often on vacant land and hence uninsurable or illegally insured under Florida law, the fact that mortgages were junior to other liens of millions of dollars, and finally the fact that the insurance bonds were of little protection and were issued by an insurance firm affiliated with ABM. Evidence indicated that investors' funds were used to make interest payments to other investors because defaults on mortgages had reduced ABM's cash supply. Evidence also tended to show that the defendants had improperly diverted company funds for their

own personal use, and for the purpose of financing other projects of interest to the defendants.

Defendants contend that they relied in good faith on the advice of counsel in operating this business. Significantly, however, the counsel upon whose advice they claim they relied was not called as a witness. In fact evidence was introduced by the government that house counsel had admonished the defendants that delivery of mortgages before houses were completed on the properties might be fraudulent, and that Florida law did not allow insurance of vacant lot mortgages. Outside counsel had also advised that apparent misrepresentations might be violations of the anti-fraud provisions of the securities laws. Letters from Aetna and Kemper insurance executives, who issued fidelity bonds to ABM, indicate their concern over misrepresentations made in ABM's advertising. Nevertheless the operation continued.

Although the numerous defendants were involved at different times and to differing degrees in the perpetration of this scheme, there was plentiful evidence at trial from which a jury could reasonably find beyond a reasonable doubt that all participated knowingly in the unlawful acts for which they were indicted. The defendants were free to introduce evidence of good faith reliance upon counsel as tending to prove they lacked criminal intent, but the jury was not bound to accept this evidence. The record contained other competent evidence from which the jury could find that the defendants in fact acted with the requisite intent to defraud.

II.

Pre-indictment Delay

The indictment which was returned on February 15, 1966, alleged that the conspiracy terminated on December 31, 1961. The appellants contend that they were deprived

of a fair and speedy trial by virtue of a delay of over four years measured from the date of termination of the scheme to the date of the return of the indictment.

The applicable statute of limitations in this case is five years. It is well-settled in this Circuit that the Sixth Amendment right to a speedy trial and the rights granted by F.R.Crim.P. 48(b) do not accrue to a defendant until after a prosecution is instituted. *Grayson* v. *United States,* 5 Cir. 1969, 416 F.2d 1073, 1076-77, cert. denied 396 U.S. 1059, 90 S.Ct. 754, 24 L.Ed.2d 753 (1970); *Harlow* v. *United States,* 5 Cir. 1962, 301 F.2d 361, cert. denied 371 U.S. 814, 83 S.Ct. 25, 9 L.Ed.2d 56 (1962). Any delay between commission of the crime and indictment is controlled by the applicable statute of limitations. *Grayson* v. *U. S.,* supra; *Bruce* v. *United States,* 5 Cir. 1965, 351 F.2d 318, cert. denied 384 U.S. 921, 86 S.Ct. 1370, 16 L.Ed. 2d 441 (1966). The defendants urge that we adopt the reasoning of *United States* v. *Parott,* 248 F.Supp. 196 (D.D.C. 1965), wherein an indictment was dismissed in part because the court found that the defendants had been unduly prejudiced by unexcused pre-indictment delay. Even if *Parrott* was the applicable law of this Circuit—which it is not—the case would not be applicable to the situation at hand, for the defendants have not sufficiently demonstrated any prejudice stemming from the lapse of time prior to indictment.

III.

Grand Jury Array

The defendants allege that the grand jury selection process in the Southern District of Florida is discriminatory and does not represent a fair cross-section of the community. This contention was specifically rejected in *Stassi* v. *United States,* 5 Cir. 1968, 401 F.2d 259.

IV.

Cahn's Motion for Continuance

Defendant Cahn argues that the trial court abused its discretion in denying his motion for a continuance so that counsel might have additional time to prepare for trial. After the indictment was filed Cahn was initially represented by an attorney who filed various pre-trial motions and participated in pre-trial proceedings. Four weeks prior to trial, this attorney was allowed to withdraw from the case with respect to representation of Cahn. Cahn took sixteen days thereafter to retain new trial counsel. Twelve days prior to trial new counsel made an oral motion for continuance. The court denied it immediately.

Apart from calling attention to the shortness of time for preparation, Cahn has not demonstrated that trial counsel was prevented from properly defending him or that he was otherwise prejudiced by being required to go to trial. In fact, the record shows that trial counsel vigorously participated in the trial and demonstrated a full range of trial talents and knowledge of the case. We find no abuse of discretion by the trial judge, and no prejudice flowing to the defendant Cahn from the denial of the continuance.

V.

Severance

Defendant Kroll claims that Cahn and Criswell had testified in a prior bankruptcy hearing that Kroll did not dominate ABM as the indictment alleged. Kroll here alleges that if a severance had been granted Cahn and Croswell would have repeated their testimony exculpating Kroll, and that the joint trial deprived him of the op-

portunity to call the two men as his own witnesses. However, when Cahn and Criswell took the stand in their own behalf they made statements tending to exculpate Kroll. The jury was free to accept this testimony. Kroll has not demonstrated an abuse of discretion by the trial court in this respect. *Smith* v. *United States,* 5 Cir. 1967, 385 F.2d 34.

With regard to the other defendants, we likewise find no prejudice from the denial of severance. Each defendant was named in each count of the indictment, and there was thus no danger that the jury would be confused or misled into considering evidence in the case of a defendant to which it did not apply. The defendants' reliance on *Bruton* v. *United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) is of course entirely misplaced. Here no confessions or out-of-court inculpatory statements by any defendants were introduced, and all of the defendants did take the stand and were fully available to each other defendant for cross-examination.

When possible without prejudice to the rights of defendants joint trial aids in the efficient administration of justice. Particularly is this so when, as here, severance would require the expense of several long trials involving substantially the same evidence. The various arguments that some of the defendants played larger roles than others in the alleged conspiracy, or that some of the defendants had allegedly "antagonizing personalities" which a jury might not like, or that the impeachment of one of the defendants might "rub off" on the other defendants, taken singly or together, do not present grounds for separate trials. The trial court fairly and fully admonished the jury during his complete and detailed instructions to consider the guilt or innocence of each defendant only upon the evidence introduced against him and to determine its verdicts separately as to each defendant under each count of the indictment.

VI.

Reading of the Indictment

Appellant Hunt urges that it was error for the trial judge to read the indictment to the jury. The trial judge's instructions informed the jury that the indictment was not evidence, that it did not raise a suspicion of guilt, and that it was merely the method by which persons are charged and brought to trial. There was no error. *United States* v. *Press,* 2 Cir. 1964, 336 F.2d 1003, cert. denied 379 U.S. 965; *United States* v. *Martin,* 2 Cir. 1955, 223 F.2d 666, 667; *Blauner* v. *United States,* 5 Cir. 1961, 293 F.2d 723, 736; *Laughlin* v. *United States,* D.C. Cir. 1967, 386 U.S. 287, 295, cert. denied 390 U.S. 1003; *United States* v. *Hoffa,* 7 Cir. 1966, 367 F.2d 698, 713, vacated on other grounds, 387 U.S. 231. See further *Williams* v. *Beto,* 5 Cir. 1966, 354 F.2d 637, and cases there cited.

VII.

Search Question

We deal here with one of the more difficult issues of the case. Cahn complains that his motion to suppress the search of the books of an affiliated company of ABM, as well as the fruits of such search, was erroneously denied because the evidence was obtained through an unlawful search. Cahn was obtained through an unlawful search. Cahn was the sole stockholder and president of the company. When the company was petitioned into bankruptcy, the referee in bankruptcy ordered the trustee to take possession of and remove the records from the premises of the company. The appellants did not object to the taking of possession by the trustee. One and a half years later, an accountant for the Securities and Exchange Commission requested permission from the trustee to examine the books. Permission was granted. The accountant remained on the scene for two years

and evidence gathered as a result of the examination was presented to the grand jury and at trial. The two principal issues raised are (1) Cahn's standing to object to the search, and (2) the authority of the trustee to consent to the search.

Our discussion begins with *Jones* v. *United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). Jones was the occasional guest of the owner of an apartment. The owner had given Jones the Key. The police searched the apartment while Jones was present, and seized narcotics which they found in a bird's nest in an awning outside the window. The Supreme Court held that Jones had standing to contest the search, noting that the search was directed at Jones because his privacy had been invaded. Mr. Justice Frankfurter, writing for the Court, said:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else". 363 U.S. at 261.

Mancusi v. *DeForte*, 392 U.S. 364, 88 S.Ct. 1154, 20 L.Ed.2d 2120 (1967), further considered the issue of standing. This case dealt with the seizure of labor union documents from an office shared by the objector and several other union officials. It was held that the official had the requisite standing to object to the search because it was a "private office" in which DeForte could reasonably expect that only union officials or their personal or business guests would enter.

In *Mancusi* the Supreme Court pointed out that standing to object to a search or seizure belong to one who has title to the premises searched, or to one who has a possessory interest in the premises, or to one legitimately

on the premises where the search occurs. It was further there stated that *Katz* v. *United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), established that the right to claim the protection of the Fourth Amendment depends not only on a property right in the invaded place, but also upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion.

In *Alderman* v. *United States,* 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969), the Supreme Court reaffirmed the vitality of *Jones*:

> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppression of relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."
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> * * * * *
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> "The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth". 394 U.S. 173-75.

Mr. Justice Fortas dissented in *Alderman,* urging:

> "The Government violates his rights when it seeks to deprive him of his liberty by unlawfully seizing evidence in the course of an investigation of him and using it against him at trial".

Although concededly the question is close we conclude that Cahn does not have standing to complain about the search. Once the corporation was in bankruptcy, Cahn no longer had any title in the corporate records, as title passed by operation of law to the trustee in bankruptcy. Title 11, U.S.C., Section 110; *Bisno* v. *United States,* 9 Cir. 1961, 299 F.2d 711. Neither did Cahn have any possessory interest in the corporate records. The records were examined on the premises of the trustee in bankruptcy, and no area in which Cahn had an interest was violated. Only corporate records, and not personal records of Cahn were examined. In this regard, see also *Elbel* v. *United States,* 10 Cir. 1966, 364 F.2d 127.

We think also that any "reasonable expectation" or agency argument proceeds on an erroneous concept of the role of a trustee in bankruptcy. The trustee is not the exclusive agent of the bankrupt, but rather is an officer of the court and a representative of creditors as well. Title 11, U.S.C., Sections 74 and 110; *Ansbacher & Company* v. *Klebanow,* 2 Cir. 1966, 362 F.2d 569. A trustee is a person appointed by the court to manage the estate in the midst of the bankruptcy proceedings, to conserve the assets, and to put the business affairs of the bankrupt in sufficient order to facilitate the dissolution of the business and the distribution of assets to creditors and those holding equity interests. We think it significant that the trustee is under a duty to report to the United States Attorney any probable criminal violations of the bankruptcy act and to disclose to that official all relevant information. Title 11, U.S.C., Section 3057. In light of the strong governmental interest in protecting creditors in a bankruptcy situation a bankrupt would indeed be shortsighted if he did not perceive that many interested parties, governmental or otherwise, might be interested in examining the books of the bankrupt business. Reasonable expectations are that government officials will be examining the books.

Henzel v. *United States,* 5 Cir. 1961, 296 F.2d 650, is not inconsistent with the result reached here. A general levy had been made on the corporation of which Henzel was the sole shareholder and president. The corporate premises searched by the Postal authorities with permission of the sheriff were still maintained by Henzel as his daily working office, and it was clear that there was an improper invasion of an area in which he has a possessory interest at the time of the search. *United States* v. *Kanan,* 225 F.Supp. 711 (D. Ariz. 1963), involved a search made with the permission of a receiver appointed under Arizona law. Because of the limited powers of a receiver under state law that case may be dismissed as not inconsistent with the result here reached, but even assuming that it is inconsistent, we choose not to adopt the *Kanan* reasoning. We also note with interest a recent article, "Standing to Object to Search and Seizure", 118 University of Pennsylvania Law Review 333 (January 1970), which details some of the problems and legal inconsistencies which pervade this area of the law. Although arguing for a broader rule on the issue of standing, the authors acknowledge that the Supreme Court cases discussed above establish the law as it is today. Perhaps the suggestions contained in the article, which would give Cahn stronger grounds to claim standing here, merit consideration by the Supreme Court in some future case or controversy. We are of the view that the law as it now stands will not support Cahn's claim of standing. In view of this conclusion, we pretermit discussion of the question raised as to the bankruptcy trustee's authority to consent to the search.

VIII.

Summary Charts

All of the appellants object to the admission of summary charts reflecting the disposition of funds by ABM and its affiliates. The charts were prepared from records of those companies by Securities and Exchange Commission exam-

iners. The underlying records were marked for identification but were never introduced into evidence. The appellants urge that summaries may not be admitted when the records upon which they are based have not been introduced into evidence.

The weight of authority stands for the proposition that summaries prepared by an expert accountant of corporate records are admissible even though the records themselves are not admitted into evidence. Rather, it is required that the records must be available (ordinarily in court, unless too bulky and cumbersome) for the defendant's inspection. *Bruce* v. *United States,* supra; *McDaniel* v. *United States,* 5 Cir. 1965, 343 F.2d 785, cert. denied 382 U.S. 826; 4 Wigmore on Evidence, 3rd Ed., Section 1230.

IX.

Prejudicial Closing Argument

Appellants Criswell and Hunt contend that it was error for the prosecutor to allude in his rebuttal closing argument to the failure of the appellants to call any investors to the stand. One of the defenses relied on by the appellants was that they had a good faith belief in the success of the company and tried to protect investors' funds, but the appellants presented no investor witnesses to testify that they had been dealt with fairly by the appellants. The prosecutor called this failure to the attention of the jury.

Smith v. *United States,* 5 Cir. 1956, 234 F.2d 385, states:

> "... the rule against commenting on the failure of a defendant to testify in his own behalf 'does not go to the extent of forbidding argument by counsel for the prosecution to the effect that the evidence against a defendant is uncontradicted'. The same is true with respect to a failure to produce testimony on any phase of the defense upon which the accused seeks to rely".

The prosecutor's comment was well within established limits of propriety.

X.

Instructions as to Good Faith Defense

The appellants Cahn and Kroll urge that the trial judge erred in refusing to give their proposed instructions on good faith. The appellee concedes that the defendants were entitled to have their defense of good faith squarely presented to the jury, but contends that the jury was fairly informed by the general instruction of the reliance on good faith as a defense. The appellee further asserts that the appellants failed to object to the charge given by the court, and that therefore here reversal can only be predicated on "plain error" which they argue was not committed. See Rules 30 and 52(b), F.R. Crim.P. We agree with the government's position as to both points.

Even though a proposed charge is a proper statement of the law and the evidence warrants such a charge, a defendant is not necessarily entitled to have the charge presented to the jury in the exact words proposed so long as the substance of the proposition is fully and fairly conveyed to the jury. The charge ultimately given by the court was disclosed to counsel during a protracted charge conference the day before counsel argued the case to the jury. We set it out in the margin.[3] The appellants contend that the words "any false representations by a defendant" led the jury to conclude that the good faith defense only applied to statements made by the defendants and not to actions of the defendants. They say that this was error of prejudicial proportions requiring reversal of their convictions.

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[3] The portion of the charge in dispute was given as follows:

"As to counts 1 through 8, 11, 13, and 14 of the indictment, any false representations made by a defendant must have been known by him to be false. A good faith belief in the truth of statements made is a complete defense to the charges of fraudulent misrepresentations." (R. 4110-11).

Not so, in our judgment. The trial judge in his instructions fully covered the elements of each offense charged and the meaning of the words "knowingly", "willingly" and "intent to defraud". Moreover, each of the defendants took the stand and made it clear that he relied on his good faith as a defense, categorically denying *malam fides* or intent to defraud. The government maintains—and we think with justice—that in the overall context of the trial and the charges the jury was fairly presented with the good faith defense. See *New England Enterprises, Inc.* v. *United States,* 1 Cir. 1968, 400 F.2d 58, cert. denied 393 U.S. 1036; *Beck* v. *United States,* 10 Cir. 1962, 305 F.2d 595. Perhaps the trial judge might have chosen words which would have more precisely conveyed that acts as well as words are included within a defense of good faith, but in a comprehensive view of this long trial (the record encompasses 4200 pages) the slight difference in nuance or accent pointed out is of minimal import. The defense was before the jury.

Further and of critical significance, we find the record bare of any objection by counsel for Cahn and Kroll to the charge as finally given by the trial judge. Before the jury began its deliberations, full opportunity to object (as contemplated by Rule 30, F.R.Crim.P.) was given, but no objection was voiced as to this phase of the instructions. Cahn's requested instruction No. 9 included a charge on good faith which covered acts as well as statements. Although a colloquy occurred during the charge conference between the trial judge and counsel for appellants Hunt and Adler over the wording of the good faith instruction which the judge proposed to give, (R. 4001-4010), and finally gave, we find no indication that counsel for Cahn and Kroll joined in that discussion or made any objections to the court's proposed good faith instruction. Counsel was told that the court would "think about" amending its own instruction covering good faith as a defense.

The following morning, just prior to the start of argument to the jury, the court went over with counsel several other matters reserved from the charge conference. Good faith as a defense was not again alluded to. No one pointed out to the court that this question had been reserved for further consideration. (R. 4056-4060) This failure to object occurred immediately following an explicit admonition from court to counsel that: "Between now and the time that the jury is retired you are going to have to comply with the rules and specifically state the specific instruction to which you are objecting". (R. 4055).

After completing his instructions to the jury, the court again gave counsel the oportunity to object to the charges contemplated by Rule 30, F.R.Crim.P. (R. 4127-37). The court specifically noted that each and every defendant had been given the benefit of an objection to those instructions which had been proposed and refused by the court during the charge conference, but was explicit in stating that specific objections were required to any charges given by the court and found objectionable. (R. 4128-29). The court further noted that while every defendant was allowed an objection as to those charges which he individually had requested and been refused, no party was given the benefit in the record of objections made by any other defendant. (R. 4130-31). The court restated its position by commenting that the requests to charge had not been made jointly, and would not be so considered for purposes of objections. (R. 4131). In the face of these repeated and rather laborious invitations to object and secure rulings, neither Cahn nor Kroll objected to the instructions as to good faith as a defense.

We have taken pains to relate these matters at some length in order to demonstrate the basis for our holdings: (1) that the point was not preserved for review by Cahn and Kroll, and (2) that we are not here justified in applying the "plain error" rule. Rule 52(b), F.R.Crim.P.

XI.

Sentence Correction

Kroll argues that he was subjected to an illegal sentence when the trial judge originally ordered five year concurrent sentences, and moments later changed the sentences to that two of the five year sentences would run consecutively. No error was committed. See *Bozza* v. *United States,* 330 U.S. 160, 67 S.Ct. 645, 91 L.Ed. 818 (1947); *Williams* v. *United States,* 5 Cir. 1970, 422 F.2d 1318; *Vincent* v. *United States,* 8 Cir. 1964, 337 F.2d 891, cert. denied 380 U.S. 988.

We have carefully considered the record and briefs with respect to the claims of each appellant. Error in the trial and conviction is not demonstrated as to any appellant. The judgment appealed from is

Affirmed.